Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

JONATHAN SHERMAN WHITSON,

Petitioner,

v.

THE CITY OF GULF SHORES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether under the ADEA and ADA the petitioner presented evidence of pretext sufficient to defeat the respondent's motion for summary judgment, without the need to show that such evidence, by itself, was probative of discrimination.

II. Whether the petitioner presented sufficient evidence that he was qualified under the ADA and that the respondent failed to provide reasonable accommodations for his disability.

III. Whether the petitioner presented sufficient evidence of a causal link between his complaint with the EEOC and the decision to terminate him.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit opinion and order affirming the district court is unpublished and is contained in Appendix A. The district court opinion is similarly unpublished and contained in Appendix B.

STATEMENT OF JURISDICTION

The Eleventh Circuit court of appeals entered judgment on June 9, 2003. App. A. The court of appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on August 12, 2003. App. C.

STATUTORY PROVISIONS INVOLVED

This case involves the Age Discrimination Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a), and retaliatory discharge in violation of those acts.

The ADEA states in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

29 U.S.C. § 623(a)(1).

The ADA states, in pertinent part, that an employer may not:

> discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

STATEMENT OF THE CASE

On September 4, 2001, petitioner Jonathon Sherman Whitson sued respondent City of Gulf Shores in the United States District Court for the Southern District of Alabama. Whitson asserted claims of discrimination under the ADEA and the ADA.

The City of Gulf Shores employed Whitson as a "Building Official" in July 1981. For eighteen years, he was responsible for zoning, inspection, code interpretations and code enforcement. Whitson also supervised other building inspectors and secretaries during his twenty-year employment tenure.

Whitson has Meniere's Disease that progressively causes severe hearing impairment in the form of distortion. During the last ten years of his employment, Whiston's steadily declining hearing eventually affected his performance, most notably in the area of communication; but he was nonetheless able to continue to perform as he had since 1981.

During the last year of his employment, Whitson asked the City for reasonable accommodations for his increasing hearing loss. At the City's request, an audiologist identified equipment that would assist Whitson in the performance of essential functions of his employment. Nonetheless, the City refused to provide Whitson with the equipment identified by the audiologist.

Despite his requests for accommodation, Whitson at age 55, was demoted in June of 2000. His supervisory authority and code interpretation functions were given to Josh Harris, a thirty-two years old male who was Whitson's subordinate. It was undisputed that Whitson had better qualifications and stronger supervisory ability than Harris.

Following Whitson's demotion and because of the continuing difficulties he was encountering with City with regard to his disability accommodation, Whitson filed an EEOC charge on October 19, 2000. On November 20, 2000, City received this charge. Subsequent to that receipt, the City Mayor then terminated Whitson, giving the written reason as "insubordination" identified by Harris identified in a memo he prepared after the City's receipt of the EEOC charge. The insubordination that Harris documented consisted of: (i) two incidents to which Whitson had responded he had not understood Harris; and (ii) Whitson's tape recording conversations in an attempt to foster his understanding. *Id.* The City terminated Whitson's employment in February of 2001.

Whitson's federal action alleged that these actions violated the ADEA and the ADA and the retaliatory protections provided by each of these acts.

At the conclusion of discovery, the City of Gulf Shores filed for summary judgment. In opposition, Whitson

presented direct evidence and sufficient evidence to support a prima facie case on each claim. Whitson further presented evidence that the respondent's proffered reasons for its acts were false or the veracity of which was at least suspicious enough that a jury should decide whether it was legitimate. Nonetheless, on August 30, 2002, the district court granted City of Gulf Shores' summary judgment motion stating that Whitson failed to produce sufficient evidence: (i) to show pretext under the ADEA or ADA; (ii) to show Whitson was otherwise qualified under the ADA and denied reasonable accommodations; and (iii) to show a causal link between his termination and the filing of the EEOC complaint. App B at 3a-4a.

Whitson filed a notice of appeal and motion to extend time to file said notice of appeal on October 2, 2002. On October 8, 2002, the district court granted Whitson's motion to extend time. On December 9, 2002, the Eleventh Circuit Court of Appeals determined that it had jurisdiction to consider the appeal and on June 9, 2003, the Court of Appeals affirmed the district court's judgment. App. A at 2a. The Court of Appeals denied the timely filed petition for rehearing and rehearing en banc on August 12, 2003. App. C. at 29a.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Of Appeals Conflicts With Decision Of The Supreme Court And With Prior Decisions Of The Eleventh Circuit.

The Court of Appeals' affirmation of the district court's entry of summary judgment cannot be squared with Supreme Court precedent regarding evidence sufficient to establish pretext.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) confirmed the allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. First, the plaintiff must establish a prima facie case of discrimination, *St. Mary's* at 506, then the burden shifts to the defendant to produce evidence that employer took the adverse employment action for a legitimate, nondiscriminatory reason. Once these evidentiary requirements are met, the *McDonnell Douglas* framework — with its presumptions and burden — disappears and the remaining issue is "discrimination vel non." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

The *St. Mary's* decision clarified that

> although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, [*St. Mary's* at 511], the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn there from . . . on the issue of whether the defendant's explanation is pretextual,' [*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)].

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106 (2000).

However, this Court further reasoned, it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief

> is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's at 511.

Such an inference is "consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' *Wright v. West*, 505 U.S. 277, 296 (1992) [further citations omitted]." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2108 (2000). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

The decision below cannot be reconciled with *St. Mary's*. The district court found that the petitioner had provided sufficient evidence of a prima facie case. However, the district court found that the petitioner's evidence showing the falsity of respondents' proffered reasons for the adverse employment actions were not, by themselves, demonstrative of a discriminatory intent. App. B 18a and 19a. Under *St. Mary's*, however, the petitioner is entitled to have a trier of fact determine whether the falsity of the proffered reason, alone, is sufficient evidence to conclude that the respondent unlawfully discriminated.

The decision below also conflicts with previous opinions of the Eleventh Circuit. In *Carter v. Three Springs Residential Treatment*, 132 F.3d 635 (11th Cir. 1998), the court of appeals determined that to overcome the plaintiff's prima facie case,

a defendant must show the existence of a objective test binding on all who are similarly situated. Subjective standards are incapable of reasonable objective evaluation and cannot be relied upon by an employer seeking to defeat the plaintiff's prima facie case. *Id.* at 644. The United States Supreme Court mandates that the business's articulated reason be closely examined where it appears suspicious.

At the time each job performance evaluation was given, Whitson provided ample explanations that deflected all of the objective criticism directed at him. The trial court acknowledged the subjective nature of the respondent's non-discriminatory reason, but held nonetheless that Whitson failed to show sufficient evidence of pretext. In order to make this determination, however, the trial court had to make an impermissible credibility finding. That is, the trial court must have rejected Whitson's explanation for the objective portions of his poor performance reviews and instead gave credibility to the respondent's view of the facts. The trial court does just that when it holds "Whitson's claim that he can explain these 'misunderstandings' does not address the alleged pretext of the city's rational [sic]." App. B 19a. If the trial court had properly assumed that Whitson was correct, then Whitson's evidence that his job performance was not in fact objectively poor should have been sufficient to show pretext.

In an attempt to distinguish the impact of *Reeves* on the outcome of the inquiry, the trial court found, "Contrary to the facts in *Reeves*, plaintiff has failed to make even a minimal showing that respondent's articulated reasons for his termination were untrue." App. B 21a. This is simply wrong. Whitson made even more than a "minimal showing," he definitively refuted all objective reasons for his termination just as the plaintiff in *Reeves* did. Thus, Whitson is entitled to go to present his case to the jury because of the trial court's improper credibility determination and misapplication of the *Reeves* case.

Similar to the ADEA argument, the respondent offers Whitson's poor performance as a reason for his demotion and termination.[1] For the reasons set forth above, Whitson asserts that the trial court erred in its analysis of the falsity of the respondent's proffered explanation for the plaintiff's demotion.

Respondent states that the reason why Whitson was terminated by the city mayor Bodenhamer (the ultimate decision maker) was for "insubordination," providing a written explanation given by the mayor at the time of Whitson's termination. The insubordination for which Whitson was fired consisted of events relayed by Josh Harris. Whitson, just eight months before, had been Harris' supervisor and had recommended, in his supervisory capacity, against Harris receiving a promotion because he thought it would be "discriminatory." As soon as Harris is in a supervisory capacity to Whitson, he recommended that the City fire Whitson for "insubordination."

Most importantly, the "insubordination" for which Whitson was fired, consisted of: (i) two "direct refusal(s) to perform certain tasks;" (ii) excessive absenteeism; and (iii) tape recording conversation. Harris stated that Whitson's response to why he had not performed these tasks was that he "didn't understand what he was supposed to do." Although Bodenhamer found that Whitson's absenteeism was not grounds for termination, he found Whitson "ignored explicit directions from his supervisor regarding important assignments within his job duties" as set forth in Harris's memo. *Id.* These statements clearly contradict each other —

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1. Both of the courts below apparently confused the issue that plaintiff contends that the respondents actions in demoting him were the discriminatory acts at issue here, not the fact that he was later terminated. The act of his termination, plaintiff sets forth below, was in retaliation and/or in violation of the ADA.

even Harris did not state that Whitson had "ignored" explicit directions, rather Whitson had stated he hadn't understood.

The trial court again makes an impermissible credibility determination that flies in the face of Harris' own memo. The trial court finds that, "according to Harris, . . . [the plaintiff] should have and would have understood the assignment." App. B 9a. However, Harris's own memo relied upon by Bodenhamer in deciding to terminate the plaintiff only says that the plaintiff did not understand the assignment. Harris made his assertion that the plaintiff should have understood the assignment later in his affidavit he filed in this litigation.

The reasons given for Whitson's termination are directly related to and have everything to do with Whitson's disabilities. There is no dispute that Whitson had a worsening hearing problem that interfered greatly with his ability to communicate. He needed to tape record conversations to try to understand them later. He needed to have people speak slowly and to communicate clearly with him. Because he "did not understand" and tape-recorded conversations, Whitson was deemed "insubordinate" and terminated.

This evidence should easily be sufficient to show that the respondent's proffered reason for terminating Whitson is pretextual. At the least, Whitson's evidence should call into doubt the credulity of the respondent's proffered reason under clear United States Supreme Court precedent and Eleventh Circuit precedent.

The Eleventh Circuit also failed to follow its previous opinions regarding Whitson's claim that he was denied reasonable accommodations under the ADA. In *Lucas v. WW. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001), the court of appeals determined that an employer unlawfully

discriminates against a qualified individual with a disability when the employer fails to provide a "reasonable accommodation" for the disability — unless doing so would impose undue hardship on the employer.

The trial court below questioned whether Whitson had produced sufficient evidence for a jury to find that he was a "qualified individual" under the ADA. The trial court states that it was not Whitson's disability that rendered him unqualified to carry out his employment position, but rather his resistance to supervision and his poor judgment or negligence in performing his job. App. B at 24a.

The ADA defines a "qualified individual with a disability: as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The "essential functions of a job are those fundamental job duties of an employment position that the individual holds or desires." 29 C.F.R. § 1630.2.

Whitson provided ample evidence that he was qualified in that he could perform the essential functions of the employment position. Whitson was a twenty-year employee with the city as a Building Official and had been an active member and officer in many professional code oversight committees, such as serving as President and on the Board of Directors of the Code Officials of Alabama. Surely if Whitson had been unable to perform the fundamental job duties of "Building Official" he would not have enjoyed the respect of his professional peers in being elected as president.

Having established that he was qualified under the ADA definitions, Whitson provided evidence that the respondent failed to provide him with a number of reasonable

accommodations that would have allowed him to perform the essential functions of his work. Under the EEOC and CFR definitions of essential functions, evidence of whether to consider a particular function as essential can include the employer's judgment, whether written job descriptions were prepared and the amount of time spent performing the function. 29 C.F.R. § 1630.2 It is undisputed that proper communication was an essential function of plaintiff's position.

At the respondent's request and in response to his complaints, Whitson went to an audiologist to have testing done on his hearing in February 2000. In response to an inquiry by the City, the audiologist made a number of recommendations that the City could implement to accommodate Whitson's increasing hearing loss and foster the communication function: a digital BTE hearing aid, which would be used in conjunction with a wireless FM assistive listening system, and a TTY telephone.

The trial court found that the hearing aid would have been primarily for Whitson's personal benefit and would not qualify as a reasonable accommodation. However, the trail court overlooked the most important component of the audiologist's recommendation, which was the wireless receiver/transmitter. This device could be used only at work — much as a hearing impaired child may use one during school hours for the same reason — it cuts down on interference and background noise. While the hearing aid itself would have been something Whitson could have procured through insurance, the wireless receiver/transmitter clearly would have been work-related and should have been provided by the respondent. Instead, the respondent simply ignored the whole issue.

As to the TTY telephone, the respondent admits that it began to look into leasing or purchasing such a system for Whitson. However, after Whitson left on Family and Medical Leave in June of 2000 because of his disability, the respondent did not purchase the system.

The trial court below found that the accommodations would not have helped Whitson's "resistance to supervision, poor judgment or negligence in performing his job, or the fact that he was constantly absent from work." App. B. at 26a. Whitson provided ample evidence to the contrary — Whitson, as the respondent concedes, had trouble understanding his assignments. As the audiologist points out in his letter to the respondent, "Meniere's Disease causes poor speech intelligibility/understanding." If Whitson's requests for reasonable accommodation had been met, the problems perceived by his supervisors as insubordination or negligence would have been resolved.

Finally, the Eleventh Circuit failed to address the plaintiff's retaliatory discharge claim under its own precedent. The court of appeals has previously held that in order to show a prima facie case for retaliatory discharge, a plaintiff must show that he was: (i) engaged in a protected activity; (ii) that he suffered an adverse employment action; and (iii) that the protected activity was causally connected to the action. *Wright v. Southland Corp.*, 187 F.3d 1287, 1305 (11th Cir. 1999) (citing *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993). Respondent concedes that Whitson meets the burden of the first two elements of the claim. Thus, the only issue is whether the protected activity is causally connected to the action.

In this case, the recommendation to terminate Whitson was made by Harris, the individual who, eight months before, had been subordinate to Whitson. As stated above, Harris

made his recommendation for a number of reasons he outlined in a memo dated November 13, 2000. On November 20, 2000, the respondent received the EEOC charge. After receiving the charge, Bodenhamer requested that Harris be more specific in his reasons for wanting Whitson to be discharged. On December 4, 2000, Harris wrote a more in-depth memorandum. Bodenhamer made his decision to terminate Whitson based on "the conduct described in Mr. Harris's memo under heading C — 'Insubordination.'" As set forth above, that conduct consisted of two incidents about which Whitson had explained he did not understand — the same communication issues that have been addressed throughout this brief. One of the other items was excessive absenteeism, which Bodenhamer deemed as not serious enough for termination. The other item of insubordination was tape recording meetings — again, the same communication issue that plagued Whitson in his hearing-impaired world.

In any event, the memorandum that was the deciding factor in Bodenhamer's decision was clearly written **after** the city had knowledge that Whitson had filed an EEOC charge for the very reasons he was being terminated — the respondent's refusal to accommodate his hearing disability and discrimination because of his disability. The trail court attempts to explain away this causal link by relying on the case law that when the decision maker makes an independent investigation, the causal link is broken. However, here the decision maker admits that he relied on the post-charge recommendation of Harris, which in itself is replete with discriminatory animus. Thus, the causal connection is only strengthened and Whitson should be able to go forward on his retaliatory discharge claim.

II. The Questions Presented Are Important.

The opinion released by the court of appeals highlights the spotty application of clear Supreme Court precedent and adherence to its own precedent in Title VII discrimination cases. Despite that this Court has issued a clear mandate against discriminatory practices and has clarified the procedure by which a plaintiff may take his case to the jury, those substantive and procedural safeguards are undermined where, as here, the law of this Court is ignored.

In this case, the court below found that the petitioner presented sufficient evidence of a prima facie case. The respondent's articulated reasons for the adverse employment action, however, were clearly suspicious at best. The petitioner effectively presented sufficient evidence that would allow a trier in fact to disbelieve the respondent and find the proffered reasons false. The district court's requirement that the petitioner show further that the evidence is probative of discriminatory intent is in direct contradiction to this Court's decision in *St. Mary's*. It is disturbing that the clear mandates of this Court regarding the procedural requirements for surviving summary judgment on a Title VII case are being disregarded.

Moreover, the court of appeal's disregard for its own prior precedent and clear congressional intent is equally disturbing as to the issue of whether the petitioner was qualified under the ADA and whether he presented sufficient evidence of the respondent's failure to provide a reasonable accommodation.

The court of appeals further improperly disregarded petitioner's compelling evidence regarding the causal link in his retaliation case. The Eleventh Circuit's inconsistent application of the law to the facts is a compelling reason to grant certiorari in this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 9, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15513
Non-Argument Calendar

D.C. Docket No. 01-00622-CV-CG-C

JONATHAN SHERMAN WHITSON,

Plaintiff-Appellant,

versus

THE CITY OF GULF SHORES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

(June 9, 2003)

Before ANDERSON, BLACK and RONEY, Circuit Judges.

PER CURIAM:

Plaintiff Jonathan Sherman Whitson, a twenty year employee for Defendant City of Gulf Shores ("City") terminated in 2001 for unsatisfactory job performance, appeals the district court's grant of summary judgment in favor of the city in this employment discrimination case. In his complaint, Whitson alleged discriminatory violations of the Age Discrimination Employment Act ("ADEA"),

29 U.S.C. §§ 621-34, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a), and a retaliatory discharge for filing an EEOC complaint. Whitson argues on appeal that he produced sufficient direct and/or circumstantial evidence of discrimination and retaliation to raise a genuine issue of material fact to preclude summary judgment. The background facts are clearly stated in the district court's order. After careful review, we affirm based on the well-reasoned order of the district court dated August 30, 2002.

Briefly, whitson proffered no credible direct evidence of discriminatory conduct to any of the claims set forth in his complaint. Assuming Whitson has made a *prima facie* case under *McDonnell Douglas* using circumstantial evidence, he has failed to produce any evidence to rebut the City's asserted legitimate reason for firing Whitson — *i.e.*, poor and substandard work performance over an extended period of time. In other words, there is no record evidence to show that the City's proffered reason for firing Whitson was pretextual and based on a discriminatory reason. This Court has repeatedly held that it will not second guess the business judgment of employers. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, so long as its action is not for a discriminatory reason. *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000). Whitson has failed to produce sufficient evidence for a triable issue as to whether the City fired him for a discriminatory or retaliatory reasons.

The district court's detailed opinion adequately addressed Whitson's ADA claim.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED AUGUST 30, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 01-0622-CG-C

JONATHAN SHERMAN WHITSON,

Plaintiff,

vs.

CITY OF GULF SHORES,

Defendant

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant, City of Gulf Shores, for summary judgment. (Doc. 16). Plaintiff claims that he was discriminated against by his employer in violation of the ADEA, in violation of the ADA and in retaliation for filing an EEOC complaint. The court finds that plaintiff has not produced sufficient evidence under his ADEA claim to show that the defendant's reason for demoting plaintiff or promoting over plaintiff should not be believed or that age was a likely motivator in defendant's decision. The plaintiff has also failed to produce sufficient evidence under his ADA claim from which a jury could find that defendant's proffered reasons for demoting plaintiff or promoting over plaintiff were pretextual. The court further finds that plaintiff has not provided sufficient evidence that defendant failed to provide a reasonable accomodation to

plaintiff under the ADA. Lastly, plaintiff has failed to establish a causal link, under his retaliation claim, between his termination and his filing of an EEOC complaint. Therefore, defendant's motion for summary judgment is due to be granted.

FACTS

In this case, plaintiff claims that he was discriminated against by his employer, the City of Gulf Shores: (1) in violation of the ADEA, (2) in violation of the ADA, and (3) in retaliation for filing an EEOC complaint. The city is governed by a mayor and city council. The mayor has known Whitson since 1981 and is generally familiar with his personnel file. Whitson, who was born on August 14, 1945, began working for the city as a building official in July of 1981 and originally reported directly to the mayor, city council and the city administrator. According to the city, Whitson was not closely managed during that time. As the city grew, Steve Griffin was hired as supervisor and Whitson was given supervisory responsibilities over two building inspectors.

According to plaintiff's brief, Whitson admits that "he made errors;" however, he contends that his employment with the city has been "mostly problem free." Whitson only received two negative evaluations prior to Steve Griffin becoming his supervisor. One of the evaluations rated him negatively for problems in sign code enforcement and the other rated him negatively on demonstrating competence in providing guidance to the general public on code and zoning matters. Whitson admitted at his deposition that he was not being harassed or discriminated against on the basis of age or disability at the time of the above evaluations. During his employment with the city, Whitson continued to receive poor evaluations. Whitson contends that there were several incidents of misunderstanding and has defended his position for each of those misunderstandings.

Appendix B

Steve Griffin noted in his evaluation of Whitson for a period of December 31, 1989, to March 31, 1990, that problems had arisen in Whitson's interpretation of codes and ordinances related to construction within the city jurisdiction. The evaluation also noted that there were several complaints over interpretation of the red clay ordinance that occurred during the rating period. Whitson reportedly concurred with the assessment. At the next rating period, done in December 1990 for the period of April 1, 1990, to October 1990, Steve Griffin again rated Whitson negatively on providing interpretation of codes and ordinances relating to construction with the city jurisdiction. Griffin also rated Whitson negatively on making on-site inspections to insure compliance with approved site and subdivision plans, on assisting the director of community and economic affairs in review of site and subdivision plans, and on the issuance of all trade permits and certificates of occupancy. Griffin also noted that Whitson's site inspections for zoning uniformity were poor. Several other areas were rated negatively including Whitson's job interest and attitude.

In November 1995, Steve Foote replaced Steve Griffin as director of the community development department. Whitson's responsibilities included receiving, reviewing, and rejecting or accepting applications for building permits, interpretation of building code compliance, and determination of whether a building permit should be issued. Whitson stated that during the first year of Foote's tenure as Whitson's supervisor, Foote did not know a lot about the job and let Whitson do whatever he wanted. Whitson does not claim he was discriminated against during that period. In May 1996, Foote gave Whitson the task of reviewing filing procedures and determining what was necessary to modify paper files from a name-based system to an address-based system. Whitson believed that the address system would not be effective and never got around to implementing that indexing system. In August 1996, Foote instructed Whitson

that he needed and expected more from him and told Whitson that he needed to let Foote know what he was working on and inform Foote of any reason for which Whitson left the office. Shortly thereafter, Whitson was reprimanded for publicly criticizing Whitson's subordinate. Whitson admits to publicly criticizing Harris, his subordinate at the time.

On October 15, 1996, Whitson indicated he would be out of work October 15 - 18 on jury duty. However, on October 17, 1996, Whitson learned that he would not be needed for jury duty that day. Whitson admits he did not return to work or inform the city, but stayed home. The following week Whitson indicated on his time sheet that he had been on jury duty on October 17.

On September 17, 1997, the city received a letter from the State of Albama Emergency Management Agency indicating that the city was not in compliance regarding a piece of property known as the Walacavage property, and as a result the city could lose funds or insurance coverage for this matter. Whitson had previously approved the permit for the Walacavage property after Walacavage had gone to Harris, Whitson's subordinate at the time, and Harris had told Walacavage the permit was not proper. Foote repeatedly asked Whitson to take certain actions to remedy the situation and ask Whitson to give Foote an update, but Whitson failed or refused to do so.

Also in October 1997, Foote had a problem with Whitson's training and travel request forms. Whitson had been told after a previous incident that all future trips were to be made according to the approved training request form. Any changes were to first be discussed with Foote. According to Foote, Whitson would turn in travel request forms and then not follow what had been approved in the form. For instance, on October 9, 1997, Whitson was approved for air fare to Myrtle Beach. However, after his travel plan was

approved, Whitson decided to drive. In addition, according to Foote, upon obtaining quotes for the air fare, Foote discovered that Whitson had inflated the air fare price by about $200.

In December 1997, Foote had more problems with Whitson. Whitson spent two days at the courthouse on a matter for which Foote had told Whitson he was not needed. That month Whitson was also sent a written memo requesting that Whitson take certain actions on a matter, yet Whitson never responded or took the requested actions. Foote continued to have problems with Whitson. The defendant submitted, as supporting evidence, numerous copies of memos sent to Whitson and notes from meetings with Whitson to discuss other incidents of Whitson's failure to perform his duties or to follow proper procedures as required by city ordinances or as instructed by his superiors.

Whitson received negative evaluations from Foote beginning with the period from April 1, 1996, to September 30, 1997. This evaluation criticized Whitson in numerous areas of Whitson's job. Whitson was again given a negative evaluation from Foote for the period of September 30, 1997, to June 30, 1999. This evaluation also criticized Whitson's job performance in a number of areas, particularly concerning his poor judgment and negligence in issuing permits and plan review. Whitson's review for the period encompassing June 30, 1999, to September 15, 2000, also detailed continued problems with Whitson's inability or unwillingness to follow supervisor's instructions, his higher than normal absenteeism, his failure to follow directives regarding his whereabouts, his inability to improve or update the building processes and procedures, and his poor judgment and decision making. Whitson continued working in his supervisory position until June 2000 when Josh Harris was promoted above Whitson. At that time, Whitson's position was restructured. After the restructuring, Whitson was directly supervised by the chief

of code enforcement, Josh Harris, and Whitson no longer had the final say on code interpretations.

According to Whitson, in June 2000, at the age of 55, he was demoted. His supervisory and code interpretation functions were given to Mr. Harris. Mr. Harris was approximately 30 years old at the time he was given the supervisory position over Whitson. Prior to his promotion, Harris was Whitson's subordinate. According to Foote, it was necessary for a change in Whitson's position because of Whitson's resistance to Foote's supervision and direction. Foote thought it unwise to allow Whitson to continue supervising other employees or to allow Whitson to make the final decisions on code interpretations and permit issuance. Foote had used counseling, reprimands and probation for Whitson, but still had problems with him. Foote had observed Harris's work and believed Harris would be a good choice for the position. Whitson states that there were other personnel who would have been better for the position because they had more experience, but Harris was a personal favorite of Foote.

After Whitson's job was restructured, Whitson was absent for most of June. On July 19, 2000, Whitson requested Family and Medical Leave, stating that he could not perform the essential functions of his job. Whitson also applied for long-term disability benefits in June 2000 through the city's long-term disability insurance carrier. Whitson represented that he was totally disabled from work. Whitson had made various applications for disability benefits since October 1999. Whitson maintains that he always indicated that he could return to work in the future and that his disability never affected his judgment or his ability to read and understand.

In September 2000, Whitson returned to work with the city because he had used up all his paid leave, was not receiving any long-term disability benefits and needed an

income. On September 14, 2000, Harris placed an inspection assignment in Whitson's basket. Whitson claims he did not learn of the assignment until 3:00 when the contractor called wanting to know why he was not there. According to Harris the assignment had been in Whitson's basket since noon and Whitson was in the office. Whitson claims that because he had a lady coming in for an appointment, he could not do the inspection. Whitson did not do the inspection as scheduled. Whitson also did not perform the inspection first thing the following morning. When Harris confronted Whitson about why he had not done the inspection, Whitson told Harris that he had been busy in the office. Harris completed the inspection himself. According to Harris, the problem was not just that Whitson failed to do the inspection — which was urgent — but that he left the contractors waiting without trying to get word to them, and he did not make alternative arrangements to handle the matter.

On October 18, 2000, Whitson was told in writing to perform a particular inspection. At the bottom of the note it said "RES BY 10.19.00." Whitson claims he did not understand the note. However, Whitson did not ask Harris to explain the assignment, did not respond to Harris in any other way, and did not do the assignment. Harris ended up performing the inspection himself. According to Harris, given Whitson's experience, Whitson should and would have understood the assignment.

On November 13, 2000, Josh Harris requested in writing that the Mayor terminate Whitson. Whitson filed an EEOC charge against the city on October 19, 2000. On November 20, 2000, the city acknowledged receipt of the EEOC charge. Mayor David Bodenhamer, Josh Harris, Steve Foote and the personnel director, Mitch Ferguson, all contend that they had no knowledge that Whitson was going to or had filed an EEOC charge until November 20, 2000. On December 5, 2000, the mayor requested and Harris

provided a more detailed statement of the reasons Harris requested Whitson's termination. The statement detailed Whitson's excessive absences from work often with no accounting for why he was absent, his poor judgment and misapplication of the code, and his insubordination. In February 2001, the mayor held a hearing, at which Whitson was present with counsel. After considering all the facts, the mayor concluded that Whitson should be terminated. The mayor executed a written opinion on the matter which included the following:

> After hearing the statements of Mr. Harris and Mr. Whitson and reviewing the related documents, I have concluded that the several occasions, Mr. Whitson ignored explicit directions from his supervisor regarding important assignments within his job duties (whether these are labeled "insubordination" or "neglect of duty,") they are not tolerable and seriously impair the functions of the Code Enforcement Department. In light of Mr. Whitson's history with the City, I have concluded that no disciplinary step short of dismissal would be effective.

Plaintiff admits that he knows of no evidence of discriminatory animus on the part of the mayor. Whitson appealed the decision of the mayor to the City Council, who later approved the mayor's decision.

Whitson has Meniere's disease, which reportedly affects the inner ear and causes severe hearing impairment in the form of distortion. Meniere's disease also causes Whitson to have attacks of vertigo. Whitson states that humidity, mold and mildew seem to cause head congestion which impacts his hearing. Whitson complained about the humidity at work several years before be was terminated. The city looked into

the matter and could not verify a problem. The city purchased Alpine air purifiers, removed the grass wallpaper that was in Mr. Whitson's office and repainted Whitson's office in an attempt to address his concerns.

Whitson claims that his hearing problem impairs his ability to perform the functions of his position with the city; but did not prevent him from performing them. Whitson's hearing steadily declined over the last ten years of his employment with the city. According to Whitson, he began to suffer from depression because of his hearing problems. Whitson states that his hearing really became a problem during the late 1980's. After that, he used hearing aids, but was constantly seeing a doctor. Whitson had trouble understanding what went on at staff meetings because of his hearing problem. He had difficulty communicating with individuals. Whitson claims that in October 1999, he asked Foote if he could get some help with his hearing, maybe by getting better equipment.

Plaintiff claims that he asked the city for the use of a cell phone to assist him in the performance of essential functions of his job. He contends that cell phones were available to other inspection staff, but that he had to use a walkie talkie which was more difficult for Whitson to hear. The cell phone would also be difficult for Whitson to use since Whitson understands best if he can see the person talking. The mayor, Foote, Harris and Ferguson deny that Whitson ever requested a specific piece of equipment or a specific accommodation.

Whitson asserts that he was constantly being harassed, but does not specify how he was harassed, except that Ferguson twice asked Whitson to have his ears evaluated and to provide Ferguson with a report from the evaluation. Whitson did as requested. The report did not specify particular equipment that Whitson had to have in order to

perform the essential functions of his job. The report mentioned that some items might be helpful, such as a hands-free phone, (which he already had), and a digitate hearing aid which would cost $4,200.00. Whitson already wore a hearing aid. The report also stated that if Whitson had trouble with phone usage, a hearing impaired telephone might be helpful. Ferguson priced the telephone equipment, but shortly thereafter, Whitson left on Family and Medical Leave, claiming that he was totally disabled from work and could not perform the essential functions of his job. A hearing impaired telephone was never ordered.

LEGAL ANALYSIS

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The trial court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986). "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002) (quoting *Anderson*, 477 U.S. at 249). "If the evidence is merely colorable, or is not significantly probative, summary judgment maybe granted." *Anderson*, at 249-50. (internal citations omitted).

The basic issue before the Court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is

so one-sided that one party must prevail as a matter of law." *See Anderson,* 477 U.S. at 251-252. The moving party bears the burden of proving that no genuine issue of material fact exists. *O'Ferrell v. United States,* 253 F.3d 1257, 1265 (11th Cir. 2001). In evaluating the argument of the moving party, the court must view all evidence in the light most favorable to the nonmoving party, and resolve all reasonable doubts about the facts in its favor. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir. 1999). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B&B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1534 (11th Cir. 1992) (citing *Mercantile Bank & Trust v. Fidelity & Deposit Co.,* 750 F.2d 838, 841 (11th Cir. 1985)).

Once the movant satisfies his initial burden under Rule 56(c), the nonmoving party "must make a sufficient showing to establish the existence of each essential element to that party's case, and on which that party will bear the burden of proof at trial." *Howard v. BP Oil Company,* 32 F.M 520, 524 (11th Cir. 1994). Otherwise stated, the nonmovant must "demonstrate that there is indeed a material issue of fact that precludes summary judgment." *See Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). The nonmoving party "may not rest on the mere allegations or denials of the [non-moving] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e) "A mere 'scintilla' of evidence supporting the [nonmoving] party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir. 1990) (citation omitted). "[T]he nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole." *Tipton v. Bergrohr GMBH-Siegen,* 965 F.2d 994, 998 (11th Cir. 1999). "Where the record taken as a whole could not lead a rational trier of fact to find for

the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 at 587 (1986) (internal quotation and citation omitted).

II. Plaintiff's Claims

As noted above, plaintiff claims that he was discriminated against by defendant: (1) in violation of the ADEA, (2) in violation of the ADA, and (3) in retaliation for filing an EEOC complaint. The court will discuss plaintiffs claims in turn below. As an initial matter, the court notes that plaintiff's discrimination claims are time barred if the plaintiff "knew or reasonably should have known of the challenged acts more than 180 days prior to" the filing of a discrimination claim with the EEOC. *Sonnier v. Computer Programs & Systems, Inc.*, 168 F.Supp.2d 1322, 1334-35 (S.D. Ala. 2001) (citations omitted). However, as noted by the plaintiff and as this court stated in *Sonnier*, "where an employee charges an employer with continuously maintaining an illegal employment practice, he may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice." *Id.* (citations and internal quotations omitted). "This continuing violation doctrine provides that a claim, which otherwise would be precluded because it is based on conduct which falls outside of the 180-day filing period, may nonetheless be considered timely if there is a "substantial nexus" between that conduct and conduct occurring within the filing period. *Id.* (citations omitted). However, the court finds that plaintiff has not demonstrated that a discriminatory act transpired within the appropriate time frame.

Appendix B

A. ADEA Claim

Plaintiff alleges that defendant violated the Age Discrimination Employment Act (ADEA), 29 U.S.C. §§ 621-34, by demoting or replacing plaintiff, and/or promoting over plaintiff. He does not allege that his termination was a result of age discrimination. Under the ADEA, it is "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff may prove discrimination by relying on either direct, circumstantial, or statistical evidence. *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995). Direct evidence is evidence which, "if believed, proves the existence of a discriminatory motive 'without inference or presumption'" *Hamilton v. Montgomery County Bd. of Educ.*, 122 F.Supp.2d 1273, 1279 (M.D. Ala. 2000) (quoting *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 641 (11th Cir. 1998)). As the Middle District of Alabama explained:

> Not only must it be evidence of discriminatory 'actions or statements of an employee' but the actions or statements at issue must 'correlat[e] to the discrimination or retaliation complained of by the employee.' Further, the statements 'must be made by a person involved in the challenged decision' and must not be subject to varying reasonable interpretations.

Id. (quoting *Lane v. Ogden Entertainment, Inc.*, 13 F.Supp.2d 1261,1274 (M.D. Ala. 1998)). Plaintiff has not provided any direct evidence of age discrimination. Plaintiff has not presented any direct evidence that any employee or officer of the city discriminated against him on the basis of his age. Evidence that another employee was treated differently does

not prove a discriminatory bias — it merely suggests a discriminatory motive and, as such, is circumstantial evidence. *See Schoenfeld v. Babbitt,* 168 F.3d 1257, 1266 (11th Cir. 1999).

Plaintiff may attempt to show age discrimination based on circumstantial evidence through the application of the *McDonnell Douglas* burden-shifting analysis established by the Supreme Court. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, a plaintiff must first raise an inference of discrimination by establishing a prima facie case. *Chapman v. AI Transport,* 229 F.3d 1012, 1024 (11th Cir. 2000) (citing *Combs v. Plantation Patterns,* 106 F.3d 1519, 1527-28 (11th Cir. 1997)). A plaintiff may do so by showing that he:

(1) was a member of the protected age group,

(2) was subjected to adverse employment action,

(3) was qualified to do the job, and

(4) was replaced by or otherwise lost a position to a younger individual.

Id. (citing *Benson v. Tocco, Inc.,* 113 F.3d 1203, 1207-08 (11th Cir. 1997). If plaintiff establishes a prima facie case, the burden shifts to the defendant; who must then "proffer a legitimate, non-discriminatory reason for the adverse employment action. The employer's burden is exceedingly light." *Hamilton,* 122 F.Supp.2d at 1280 (quoting *Meeks v. Computer Assoc. Int'l,* 15 F.3d 1013, 1021 (11th Cir. 1994) (internal quotations omitted)). If the defendant proffers a legitimate reason for plaintiff's termination, the burden then shifts back to plaintiff, who must show that the employer's proffered reasons are pretextual, or merely a cover for

discrimination. *Id.* "At the pretext stage, in order to survive summary judgment, plaintiff must provide sufficient evidence to allow a reasonable fact finder to conclude, at a minimum, that the proffered reasons were not actually the motivation for the employer's decision." *Miller v. Bed, Bath & Beyond, Inc.*, 185 F.Supp.2d 1253,1270 (N.D. Ala. 2002) (citing *Combs*, 106 F.3d at 1538). Plaintiff may do this by (1) "showing that the employer's legitimate nondiscriminatory reasons should not be believed; or" (2) "showing that, in light of all of the evidence, a discriminatory reason more likely motivated the decision." *Id.* (citations omitted). "This is done by pointing to 'such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons . . . that a reasonable factfinder could find them unworthy of credence.'" *Id.* at 1281 (quoting *Combs*, 106 F.3d at 1539). The ultimate burden of persuasion remains with the plaintiff at all times in cases involving merely circumstantial evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In satisfying the ultimate burden of proving that the adverse employment action was on account of age, a plaintiff need not establish that age was the sole reason for the action but, that it was a determinative factor in the employer's decision. *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224 (11th Cir. 1982) (citing *Haring v. CPC International, Inc.*, 664 F.2d 1234, 1239-40 (5th Cir.1981)). However, it should be noted that federal courts "do not sit as a superpersonnel department that reexamines an entity's business decisions." *Id.* (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466,1470 (11th Cir. 1991)). It is not appropriate for either the plaintiff or this court to "recast an employer's proffered non-discriminatory reasons or substitute his business judgment for that of the employer." *Id.* (quoting *Chapman*, 229 F.3d at 1030). "An 'employer may fire an employee for a good reason, a bad reason, a reason based on

erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.'" *Nix v. WLCY Radio/ Rahall Communication,* 738 F.2d 1181, 1187 (11th Cir. 1984).

Looking at the facts in the light most favorable to plaintiff, the court will assume for the purpose of this summary judgment motion that plaintiff has established a prima facie case. Plaintiff, at age 55, was clearly a member of the protected age group. There is some issue as to whether there was actually an adverse employment action, but looking at the facts in the light most favorable to plaintiff, the court will assume that he has suffered an adverse employment action. It is highly questionable whether plaintiff was qualified to perform the job he was demoted from or the position Harris was promoted to. As discussed below, the city has submitted credible evidence that plaintiff was demoted or promoted over for legitimate nondiscriminatory reasons concerning plaintiff's job performance. However, the court will presume, *arguendo,* that plaintiff was qualified. Lastly, plaintiff was replaced or promoted over by a younger individual. The burden thus shifts to defendant to proffer a non-discriminatory reason for demoting plaintiff.

According to Foote, it was necessary for a change in Whitson's position because of Whitson's resistance to Foote's supervision and direction. Foote thought it unwise to allow Whitson to continue supervising other employees or to allow Whitson to make the final decisions on code interpretations and permit issuance. Foote had used counseling, reprimands, and probation with Whitson, but still had problems with him. Both before and during the time Foote was plaintiff's supervisor, plaintiff received numerous negative evaluations concerning his job performance. Those evaluations strongly support Foote's decision. Defendant has established a legitimate reason for terminating Whitson. The burden thus shifts back to plaintiff to demonstrate that the employer's proffered reasons are pretextual.

Appendix B

The only evidence produced by plaintiff is that, according to Whitson, he was in fact qualified and that there were other personnel who would have been better for the position than Harris because they had more experience. According to Foote, he had observed Harris' work and believed Harris would be a good choice for the position. Whitson stated that Harris was a personal favorite of Foote. The defendant's proffered reasons are not pretextual simply because they are based on personal or subjective reasons. *See Chapman v. AI Transport,* 229 F.3d 1012, 1033-34 (11th Cir. 2000) ("A subjective reason can constitute a legally sufficient, legitimate, non-discriminatory reason under the *McDonnell Douglas/Burdine* analysis". As stated above, a defendant's reason is legitimate whether it was a good or a bad reason, or for no reason at all, as long as the determinative reason was not plaintiff's age or some other discriminatory reason. Even if the decision was based in part on misunderstandings or criticism which plaintiff reports he has an explanation for, an employment decision is not discriminatory because it was based on a mistaken belief. *Silvera v. Orange County School Bd.,* 244 F.3d 1253, 1261 (11th Cir. 2001). Whitson's claim that he can explain these "misunderstandings" does not address the alleged pretext of the city's rational. It merely attempts to reexamine the city's business decisions.

Plaintiff cites *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000), for the proposition that the plaintiff is entitled to go forward to the jury where there is a colorable issue regarding the falsity of the defendant's proffered reason, regardless of whether there is independent evidence of discriminatory intent. However, this case is distinguishable from *Reeves.* The only evidence Whitson has presented towards pretext is that Whitson has explanations to refute the bases for some of his negative reviews and that many of his alleged errors in judgment involved subjective determinations. Plaintiff has admitted that some of the negative reviews were warranted and has admitted to

committing many of the actions of which his supervisors have complained. As noted above, a subjective reason can constitute a legally sufficient, legitimate, non-discriminatory reason. Plaintiff has not presented sufficient evidence to meet his burden of showing that defendants' reasons were not true or are unworthy of credence. Moreover, there is no evidence that defendants made age-based comments or otherwise expressed some discriminatory animus towards plaintiff that would give rise to an inference that defendant's reasons were a pretext for age discrimination. As this court explained in *Sonnier v. Computer Programs & Systems, Inc.*, 168 F.Supp.2d 1322, 1331-32 (S.D. Ala. 2001):

> In *Reeves,* the defendant was terminated after forty years with his employer. The employer stated that the plaintiff was fired because of failure to maintain accurate attendance and hourly records of employees whom he supervised. *Reeves,* 530 U.S., at 138, 120 S.Ct. 2097. In response, the plaintiff introduced evidence that he had accurately maintained the records of employees whom he supervised, and that his supervisor had demonstrated age-based animus in his dealings with the plaintiff. *Id.* After a verdict in the plaintiff's favor and a reversal by the Fifth Circuit, the Supreme Court granted certiorari. The Supreme Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted [non-discriminatory] justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves,* 530 U.S. at 147, 120 S.Ct. 2097 (emphasis added). The Supreme Court noted that the plaintiff made a "substantial showing that [defendant's] explanation was false" by offering evidence that he had properly maintained the employee attendance records, and that errors in

monthly reports were not attributable to the plaintiff. *Id.*, at 145, 120 S.Ct. 2097.

> Reeves does not stand for the proposition that any evidence of falsity, regarding the reason for termination, combined with a prima facie case is sufficient to withstand summary judgment. *See Hutchinson v. Weiss, Peck and Greer, L.L.C.*, 2000 WL 1836757 (2nd Cir. 2000) (unpublished opinion). Rather, "whether a prima facie case plus an employer's pretextual reason for firing is sufficient to overcome a motion for summary judgment depends on 'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . . .'" *Id.* at *2, quoting *Reeves*, 120 S.Ct. at 2109.

Contrary to the facts in *Reeves*, plaintiff has failed to make even a minimal showing that defendant's articulated reasons for his termination were untrue. The court will not substitute its business judgment for that of the employer. Whitson has not produced sufficient evidence to show that the city's reason for demoting plaintiff or promoting over plaintiff should not be believed or that age was a likely motivator in the decision. The city's proffered reasons are not weak, implausible, inconsistent, incoherent, or contradictory such that a reasonable factfinder could find them unworthy of credence.

B. ADA Claim

Under the Americans with Disability Act (ADA) 42 U.S.C. § 12112(a) an employer may not:

> discriminate against a qualified individual with a disability because of the disability of such

> individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

To establish a prima facie case of disability discrimination, plaintiff must demonstrate that he (1) has a disability, (2) is a qualified individual with a disability, and (3) was subjected to unlawful discrimination because of his disability. *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999). Unlawful discrimination may also consist of a failure to provide a reasonable accommodation for a disability if that accommodation would enable the employee to perform an essential function of the job. *Lucas v. WW. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001).

Defendant concedes for the purpose of this summary judgment motion that plaintiff is disabled as defined by the ADA. However, defendant disputes that plaintiff is qualified or that he was subjected to unlawful discrimination because of his disability.

The ADA defines "qualified individual with a disability" as an individual with a disability, who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). As discussed above, defendant maintains that plaintiff was not qualified to perform the essential functions of his employment position, not due to his disability but, due to his resistance to supervision and poor judgment in interpretation. The court finds it doubtful that plaintiff was qualified for the position before it was restructured. However, assuming, *arguendo*, that he has established a genuine issue of fact as to whether plaintiff was qualified for the position at the time he was demoted or promoted over, the court finds that plaintiff has failed to establish that he was subject to unlawful discrimination.

Appendix B

Plaintiff has not established any direct evidence of discrimination based on his disability. In the absence of direct evidence of discrimination a plaintiff may establish a prima facie case of discrimination by using the *McDonnell-Douglas* burden shifting analysis discussed above in reference to plaintiff's ADEA claim. *See Wascura v. City of South Miami,* 257 F.3d 1238, 1242 (11th Cir. 2001) (citing *Hilburn,* 181 F.3d at 1226); *see also Richio v. Miami-Dade County,* 163 F.Supp.2d 1352 (S.D. Fla. 2001). The court will again presume that plaintiff has established a prima facie case. Defendant has admitted that plaintiff is disabled and as discussed above the court will presume, *arguendo,* that plaintiff is qualified[1] and has suffered an adverse employment action. The court further finds that, as discussed above, defendant has established a legitimate reason for demoting plaintiff or promoting over plaintiff. The burden thus shifts back to plaintiff to demonstrate that the employer's proffered reasons are pretextual.

Plaintiff's adverse employment action claim under the ADA fails for the same reason plaintiff's ADEA claim fails. He has not produced sufficient evidence for a jury to find that defendant's proffered reasons should not be believed or that plaintiff's disability was a determinative factor. The only additional evidence of pretext submitted on plaintiff's ADA claim consists of plaintiff's contention that he was harassed by Foote. However, the only evidence of harassment is plaintiff's assertion that he was told to have his hearing tested and to provide Foote with the evaluation. Foote then used the report to evaluate the severity of plaintiff's condition and determine whether any equipment accommodations would be necessary. Such actions do no demonstrate that defendant had a discriminatory intent. The court finds that plaintiff has

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1. As discussed further below, the court is of the opinion that plaintiff has not produced sufficient evidence for a jury to find that he was a "qualified individual" under the ADA.

failed to produce sufficient evidence from which a jury could find that defendant's proffered reasons were pretextual.

Plaintiff next claims that defendant failed to provide reasonable accommodations to plaintiff in violation of the ADA. "An employer unlawfully discriminated against a qualified individual with a disability when the employer fails to provide a 'reasonable accommodation' for the disability unless doing so would impose undue hardship on the employer." *Lucas,* 257 F.3d at 1255 (citing 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a)). Again, the court questions whether plaintiff was a qualified individual. The ADA defined a "qualified individual with a disability" an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8). The "essential functions of a job are those fundamental job duties of an employment position that the individual holds or desires" 29 C.F.R. § 1630.2. The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. 29 C.F.R. § 1630. As is reflected by the legitimate non-discriminatory reasons for the restructuring of plaintiff's position, it was not the plaintiff's disability that rendered him unqualified to carry out his employment position, but rather his resistance to supervision and his poor judgment or negligence in performing his job.

Furthermore, plaintiff has not identified a "reasonable accommodation." An accommodation is "reasonable" only if it enables the employee to perform the essential functions of the job. *Id.* (citing *LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir.1998)). "The plaintiff bears the burden of identifying an accommodation, and of demonstrating that the accommodation allows him to perform the job's essential functions." *Id.* at 1255-56 (citing *Stewart*

v. Happy Herman's Cheshire Bride, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997); *Willis v. Conopco, Inc.*, 108 F.3d 282, 283 (11th Cir. 1997)). Plaintiff points to the fact that he was not given a cell phone, but admits that the cell phone would not have solved his problems. He would still have had difficulty understanding conversations on the cell phone. Plaintiff also points to the fact that a digital hearing aid would have been helpful. However, the employer's obligation to accommodate does not extend to modifications that are primarily for the personal benefit of the individual in his everyday life. As explained in 29 C.F.R. § 1630.9:

> The obligation to make a reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job related, e.g. specifically assists the individual in performing the duties of particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses.

The court finds that a hearing aid would be primarily for plaintiff's personal benefit and would not qualify as a reasonable accommodation. The only other accommodation identified by plaintiff is a hearing impaired telephone, but plaintiff did not request such an accommodation. Furthermore, defendant began investigating the reasonableness of purchasing a hearing

impaired telephone for plaintiff, but discontinued its efforts when plaintiff took an extended leave of absence. "The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the employee with a disability." *Richio,* 163 F.Supp.2d at 1365 (citing 29 C.F.R. § 1630.2(o)(2)(ii)(3) (2000)). Further, the court notes that "an employer is not required to accommodate an employee in any manner in which that employee desires," *Id.* (citing *Stewart,* 117 F.3d at 1255), and it not required to investigate possible reasonable accommodations if plaintiff cannot identify an accommodation. *Earl v. Mervyns, Inc.,* 207 F.3d 1361, 1367 (11th Cir. 2000). Moreover, as discussed above, none of these accommodations mentioned above would remedy plaintiff's problems with resistance to supervision, poor judgment or negligence in performing his job, or the fact that he was constantly absent from work.

Additionally, the restructuring of plaintiff's job which plaintiff claims was an act of discrimination, could be considered an accommodation. While that accommodation did not appear to remedy the problem, it is further evidence that defendant had no discriminatory intent and attempted to accommodate plaintiff as best it could. Plaintiff was unable to perform the job before the restructuring and defendant attempted to change plaintiff's position to one that plaintiff was capable of performing. Plaintiff's pay was not cut, only his responsibilities. As noted by the *Richio* court, the employer is not required to continue to pay an employee reassigned to a lower grade position the same salary when an accommodation is made. *Richio,* 163 F.Supp.2d at 1366. The fact that defendant did not decrease plaintiff's pay is further evidence that defendant had no discriminatory animus and was attempting to make a reasonable accommodation. *Id.* The court finds that plaintiff has not submitted sufficient evidence for a jury to find that defendant discriminated against plaintiff by failing to make a reasonable accommodation.

Appendix B

C. Retaliatory Discharge Claim.

Plaintiff alleges that the defendant discharged plaintiff in retaliation for filing a complaint with the EEOC. "[T]he same analytical framework applies to retaliation claims as applies to other employment discrimination claims, including the availability of the *McDonnell Douglas* presumption." *Wright v. Southland Corp.*, 187 F.3d 1287, 1305 (11th Cir. 1999) (citing *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993)).

To establish a prima facie case of retaliatory discharge the-plaintiff must show:

> (1) that he engaged in a statutorily protected expression;
>
> (2) he suffered an adverse employment action; and
>
> (3) there was a causal link between the adverse action and his protected expression.

Lucas, 257 F.3d at 1260. (citations omitted). The plaintiff's filing of an EEOC charge is clearly a protected expression and being terminated is certainly an adverse employment action. However, plaintiff has not established a causal link between the two. The decision to terminate plaintiff was made by the mayor. Plaintiff admits that he knows of no evidence of discriminatory animus on the part of the mayor. Harris was plaintiff's supervisor at the time and recommended his termination. However, there is no evidence that Harris even knew that plaintiff had filed an EEOC charge at the time he made the recommendation. The undisputed testimony is that Harris, in fact, did not have knowledge of the EEOC charge at that time. Furthermore, in the Eleventh Circuit, when a biased recommender and the actual decision maker are not

the same person, a plaintiff may not benefit from the inference of causation that would arise from their common identity unless the plaintiff can establish that the decision maker followed the biased recommendation without making an independent investigation. *Stimpson v. City of Tuscaloosa,* 186 F.3d 1328, 1331 (11th Cir. 1999) (citing *Llampallas v. Mini-Circuits, Lab, Inc.,* 163 F.3d 1236, 1248 (11th Cir. 1998). In such a case, the recommender is using the decision maker as a mere "cat's paw" to give effect to the recommender's discriminatory animus. *Id.*

In this case, the mayor had known plaintiff since 1981 and was generally familiar with his personnel file. The mayor held an independent hearing at which Whitson was present. Upon appeal, the city council also approved the decision of the mayor. Plaintiff has not established that the mayor simply followed Harris' recommendation. Harris' recommendation that the mayor terminate plaintiff "does not, itself constitute a change in the terms or conditions of employment absent sufficient causal link between the termination and the discriminatory animus behind the recommendation." *Stimpson,* 186 F.3d at 1331. Furthermore, defendant has established legitimate reasons for terminating plaintiff and plaintiff has failed to produce sufficient evidence that defendant's proffered reasons were pretextual.

CONCLUSION

For the foregoing reasons, the court finds that plaintiff's motion for summary judgement is due to be and is hereby **GRANTED. The Clerk is directed to close this case.**

DONE and ORDERED this 30th day of August, 2002.

s/ Callie V.S. Granade
CALLIE V.S. GRANADE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 12, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-15513-II

JONATHAN SHERMAN WHITSON,

Plaintiff-Appellant,

versus

THE CITY OF GULF SHORES,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: ANDERSON, BLACK and RONEY, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by Jonathan Sherman Whitson is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 17 2003
OFFICE OF THE CLERK

No. 03-716

IN THE

Supreme Court of the United States

JONATHAN SHERMAN WHITSON,

Petitioner,

v.

THE CITY OF GULF SHORES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

There are no additional parties to the above-styled action other than Petitioner Whitson and the Respondent City of Gulf Shores.

The City of Gulf Shores is a municipality organized under the laws of the State of Alabama.

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CORRECTION OF FACTUAL STATEMENT OF PETITIONER'S BRIEF

Briefly below Respondent City of Gulf Shores addresses misstatements of facts contained in Petitioner's Factual Statement. Petitioner Sherman Whitson distorts and minimizes the failure of Whitson to perform his job, the reasons for the City's employment actions, the extensive efforts to rehabilitate him by the City and the City's attempts to accommodate his various complaints.

1. *Areas of Misstatement of Facts*

These misstatements are contained in page 2, last paragraph of his brief referring to his ability to perform his job since 1981. There are also misstatements contained in page 3, second paragraph regarding his qualifications and supervisory abilities as well as page 3, paragraph 3. There is incomplete testimony and misstatements regarding accommodations and requested attempts to accommodate Whitson contained in page 3, first paragraph of his brief. Whitson's statements made on page 4, paragraph 2 in his brief about how he refuted the reasons for the employment actions of the City are not true.

2. *Summary of Corrected Facts*

In summary, Whitson's performance with the City has been poor, and this poor performance has been well documented. The City has made numerous attempts at progressive discipline to attempt to avoid termination, but when left with no alternative, fired Whitson. From 1989 until he was terminated, Whitson had three different supervisors who sought his termination. He had four different supervisors over the years who had given him negative evaluations. He had a series of negative evaluations (outlined in more detail below), was placed on probation, given warnings and given reprimands. These problem areas involved poor

judgment in permitting, refusal to carry out directives or projects if he did not like them, excessive absenteeism, misrepresentations of his whereabouts during work hours, a general resistance to being managed and poor work attitude.

Eventually the City sought to restructure his job in order to retain him and let him work in areas that he did well and take away items that he was not doing well. Whitson admitted the job restructuring was because City management wanted a manager it could control. Whitson immediately then claimed he was totally disabled from being able to work at all, left work on three-months medical leave (filing a document stating he was unable to work), and applied for long-term disability insurance benefits with a private insurance carrier. In this insurance claim, he and his doctors asserted that he was 100% disabled from work.

For reasons, that he admitted were unrelated to any improvement in health, he sought to return to his job after being absent on medical leave for several months. He was allowed to return to the restructured job and shortly thereafter knowingly refused to carry out certain instructions – failure to perform inspections as directed. His then supervisor moved to terminate him by requesting the termination from the City Mayor. After this termination request had been made, the City then received noticed that he had filed an EEOC claim. He was given a full administrative hearing (with legal counsel present) and was terminated as described in detail below by the Mayor. He admits the Mayor has no discriminating animus against him. In fact, the Mayor on a previous occasion had put him back to work after a prior supervisor in 1990 wanted him terminated, because the Mayor wanted to try to correct the problems rather than fire him. His termination was affirmed by the City Council. He is not aware of any discriminating animus on the part of the Council. There is no evidence that the Mayor or Council simply rubber-stamped

the recommendation of the supervisor recommending termination.

When Whitson was questioned in his deposition about why the job was restructured, he stated that the person who was given his supervisory duties, had been given this position because he was liked better by Whitson's supervisor and would do what management wanted him to do. Whitson also claims that the City did not like him because of testimony Whitson had given in a lawsuit in prior years. That litigation had nothing to do with an employment discrimination claim or an EEOC claim. Whitson never put forth anything to try to demonstrate that the actions in restructuring his job or in his termination were the result of discrimination based on age or disability. He did submit some evidence of falsity (his subjective opinions) of a few of the items underlying his negative evaluations. Most of management's reasons for the different reprimands and negative evaluations over the years went unchallenged by Whitson. But more importantly he admits the reason for the job restructuring – desire by City management for a supervisor it can control better – and for the termination – failure to carry out two inspections after being directed in writing to do so. There is no evidence of falsity of these reasons, and each one are legitimate non-discriminatory reasons.

3. *Complete Factual Background*

The City of Gulf Shores has a population of approximately 5,000 people. It is located on the coast of Alabama and proper real estate development for the City is very important. The City is governed by a Mayor and City Council. The present Mayor, David Bodenhamer, has been the Mayor of Gulf Shores since 1988. Prior to being the Mayor of Gulf Shores, he served as a City Councilman for two, four-year terms. The Mayor has known Petitioner Sherman Whitson since 1981, and was generally familiar with

his work record of his entire tenure with the City. Whitson admits that he knows of no discriminatory animus of the Mayor or any Council members towards him.

Whitson began working with the City of Gulf Shores in 1981, and initially reported directly to the Mayor and City Administrator without any intervening supervision. At the time Whitson started with the City, he was a Building Official. There was not a zoning department set up at that time. He had responsibility for the overall planning for zoning and development within the City.

By 1990, the City had grown so that Whitson served as Building Official and was directly supervised by an individual named Steve Griffin, Director of the Community Development Department. Whitson, in turn, supervised two Building Inspectors, until Spring 2000. Once the position of Director of the Community Development Department was established, that individual not only supervised Whitson, but also the Zoning Administrator, secretary for the department, and a permit clerk.

In November of 1995, Steve Foote replaced Steve Griffin as the Director of Community Development Department. Foote would directly supervise Whitson until Whitson's position was restructured so that Whitson was directly supervised by the Chief of Code Enforcement. The Chief of Code Enforcement was, in turn, directly supervised by the Director of Community Development Department.

Before the spring of 2000, in addition to supervising two building inspectors, Whitson was responsible for receiving, reviewing and rejecting or accepting applications for building permits. He had the final decision on interpretation of building code compliance and whether the building permit should be issued. After restructuring Whitson's position, Whitson was directly supervised by the Chief of Code Enforcement, Josh Harris. He also no longer had the final

say on code interpretations. On November 13, 2000, Josh Harris requested that the Mayor terminate Whitson. Mayor Bodenhamer, Foote, Harris, and Mitch Ferguson (Personnel Director) were unaware that Whitson had filed an EEOC charge until November 20, 2000.

Generally, Whitson received favorable evaluations prior to Steve Griffin becoming his supervisor. There were two exceptions. In 1987, his supervisor, George Phillips, rated him negatively on problems on sign code enforcement, and in 1988 rated him negatively on demonstrating competence in providing guidance to the general public on code and zoning matters. Whitson concurred with this assessment. Prior to Steve Griffin becoming Whitson's supervisor, Whitson was not closely managed and pretty much ran this area of the City government as he liked.

In 1989, Steve Griffin took over as Whitson's supervisor. During Griffin's evaluation of Whitson for the period of December 31, 1989 to March 31, 1990 Griffin noted problems had risen in Whitson's interpretations of codes and ordinances for construction within the City jurisdiction. Whitson concurred with this assessment.

On his next evaluation, Steve Griffin rated Whitson negatively again on providing interpretation of codes and ordinances related to construction within the City jurisdiction. This evaluation was done in December of 1990 for the period of April 1, 1990 to October 1990. Griffin rated Whitson negatively on making on-site inspections to insure compliance with approved site subdivision plans. He rated Whitson negatively on assisting the Director of Community and Economic Affairs, and review of site and subdivision plans, and on the issuance of all trade permits and certificates of occupancy. Griffin noted that Whitson's site inspections for zoning uniformity were poor. Several other areas were rated negatively, but more importantly, Griffin rated Whitson, very negatively on job interest and attitude. Steve Griffin

attempted to terminate Whitson in 1991, and Whitson responded with unspecified claims of harassment against Griffin at that time. Whitson admits that he has no specific facts that Griffin's actions were the result of discrimination.

At the time of the evaluation, Whitson was between 44 and 45 years old. He testified that he did have some hearing problems in 1989, but that his hearing did not interfere with his job between 1990-1999.

In 1995, Steve Foote began working for the City and in November 1995, Foote replaced Griffin as Director of Community Development Department and as supervisor of Whitson. Whitson claims that Foote did not know much about the job when he began working at the City and during the first year of Foote's administration as Director, he let Whitson do what Whitson wanted to do. Therefore, the two had no problems even though Whitson still had hearing problems during this period. Whitson claims that he was not discriminated against between March 30, 1995 and March 30, 1996 even though he had a hearing problem.

The following are illustrations of problems with Whitson. On May 16, 1996, by way of a written memo, Whitson was asked by Foote to review filing procedures to determine what was necessary to modify paper files from a name-based system to an address system. By Whitson's own admission, he never got around to implementing this index system after four years of being given the assignment. This incident illustrates the overall problem with Whitson. He disagreed with the way Foote wanted to index the system so he never did it. In August of 1996, Foote had a discussion with Whitson in which he communicated to Whitson that he needed and expected more from Whitson and instructed Whitson that he needed to know what Whitson was working on and needed to be told of any reason that Whitson left the office. This directive was due to Whitson's disappearance from work for extended periods of time. Shortly after that

meeting, Foote had to reprimand Whitson for publicly criticizing Whitson's subordinate. Whitson admits that he criticized Harris, his subordinate, in front of Harris' co-employees.

On October 15, 1996, Whitson indicated that he would be out of work on jury duty in the Circuit Court of Baldwin County. He was supposed to out of work October 15, 16, 17 & 18. Like most Alabama counties, Baldwin County tells jurors to call in each day to find out if they will be needed for jury duty. Whitson learned on October 17, 1996 that he would not have to be present for jury duty that day. Rather than return to work or contact the City and ask for leave, Whitson simply stayed at home. The following week, Whitson turned in his time sheet and represented affirmatively, as well as falsely, to the City that he was absent on October 17 for jury duty. Foote contacted the Circuit Clerk's office in Baldwin County and learned that Whitson had not been on jury duty on October 17, 1996. He confronted Whitson with this fact and Whitson tried to say that he was sick that day. Whitson admitted in his deposition that he knew he was making a false misrepresentation when he turned in this time sheet. Whitson was well aware that he must obtain permission before being out on leave and must let his supervisor know where he was going. A series of reprimands continued in 1997 regarding these problems.

On September 12, 1997, the Mayor received a letter from the State of Alabama Emergency Management Agency that indicated that the City was not in compliance with its regulations regarding a piece of property known as the Walacavage property. This matter was an urgent matter because the Agency indicated to the City that the City might lose participation in the national insurance program if the matter was not resolved. Whitson approved the permit for the Walacavage property after Mr. Walacavage had gone to Josh Harris, Whitson's subordinate and been told that the

permit was not proper. Whitson was instructed in writing to remedy the situation by his supervisors. Follow ups for Whitson to take action on the situation occurred verbally and in writing on several different dates. Whitson did not actively and timely pursue remedying this matter and his lack of action potentially jeopardized the City's participation in the Flood Program. Whitson's argument was that the City and the governmental agency were wrong in their interpretation; however, this argument misses the point. Whitson was undisputedly instructed to take certain action and refused because he disagreed with the City's and the Emergency Management Agency's interpretation.

In October 1997, Foote counseled Whitson again about Whitson's not following the appropriate procedure for providing travel request forms, detailing travel expenses, acting consistently with approved travel request forms, and having any modifications preapproved. This travel problem basically involved Whitson's attempt to make a little extra money by having air travel approved on a travel request form and then using his own personal vehicle to travel in order to receive mileage money. The extra time to travel by vehicle would involve additional leave time for Whitson and time away from work. Whitson had missed many, many days by this point and was behind in his job.

In December 1997, Whitson was counseled because he spent two days sitting at the Courthouse needlessly. Whitson was there to provide documents to the Court for a subpoena from lawyers involved in a lawsuit in which the City was not a party. Foote had communicated to Whitson that Foote had spoken with different lawyers involved in the case in which the documents were requested, and that those lawyers indicated that he did not need to be at the Courthouse. Whitson stayed at the Courthouse anyway sitting in the hallway. That same month, Foote had sent a written memo requesting Whitson take certain actions in December 1997 on a matter. Documentation was also submitted to the trial

court that showed Whitson had never responded to this request. In fact, there are numerous memos and written documentation that was submitted to the Court demonstrating Whitson's failure to timely respond to different tasks requested.

Whitson, in his capacity as Building Official, was responsible for checking code compliance as well as zoning compliance before issuing permits. However, before rendering interpretations of matters involving zoning issues, Whitson was to consult with the Zoning Department. Whitson was counseled in writing on two occasions for not following those instructions. Again in 1998, documentation was submitted to the Court where Whitson was requested to take certain actions on a project and failed to follow the instructions of his supervisor, Foote. The documentation also showed misinterpretations or poor enforcement of code and zoning regulations.

Also, that year, Foote documented his conversations with Whitson in which Whitson basically misrepresented his whereabouts in order to fish when he was supposed to be attending a seminar. There is additional documentation that was submitted to the trial court of the failure of Whitson to carry out his duties regarding a flood management plan, absenteeism, building permits for single family residences, and modifications of flood damage prevention ordinance (to which Whitson was slow to respond and that Foote ultimately had to do the work). There were other actions that Whitson was supposed to carry out and never did. This behavior continued through 1999 and is all documented. None of the activities deal with Whitson's hearing, and according to Whitson's testimony, his hearing through 1999 with the use of a hearing aid was fine and did not impair his ability to perform his job.

Also, during this period, Whitson received a detailed negative evaluation from Steve Foote. This evaluation

criticizes Whitson for a number of areas including that he should spend less time socializing and more time in productive pursuits, his not accepting responsibility for building code functions nor acting to improve them, that he had not set a proper example for work ethic, that he had been negligent in performing plan, permit, and review responsibilities, that he had not updated forms for hand-outs to the public, and referred to reprimands discussed earlier. The evaluation lists different specific instances for poor judgment and errors in permitting properties.

Again, for a period covering September 30, 1997 until June 30, 1999, Foote did an evaluation for Whitson. This evaluation criticized Whitson in a number of areas, particularly about his poor judgment and negligence in issuing permits and plan reviews. He was criticized for not taking initiative in updating the Flood Damage Prevention Ordinances without the supervisor's insistence and that he periodically left the office without informing his supervisor of where he was going and without obtaining permission. Foote notes that Whitson had a higher than normal absenteeism. The evaluation lists a number of areas that were interpretation errors by Whitson. It lists a number of actions that were to be taken to improve his job performance. These actions had either not been timely improved or there had been no improvement at all.

Another evaluation was completed for Whitson from June 30, 1999 to September 15, 2000. This evaluation is also a generally negative evaluation of Whitson's performance. It lists in detail continued problems with his inability or unwillingness to follow supervisor's clear instructions, absenteeism, failure to follow communication directives regarding his whereabouts, inability to improve or update building processes and procedures, and poor judgement in decision making. It lists a number of specific examples of cases where he used poor judgement in issuing permits and

noted that Whitson failed to follow through on code enforcement complaints unless prompted by the department head.

In 2000, Whitson used 485 hours of sick leave. This was used in addition to his attending numerous conferences and working only partial days. During that period, Foote counseled Whitson about misusing his City vehicle. Also, in May 2000, Whitson was given certain assignments as shown in a memo that was submitted to the District Court. Those assignments were not timely performed. In December 2000, Steve Foote left a voicemail for Whitson to attend a staff meeting and Whitson failed to show up because he had left early without any explanation to Foote or without receiving permission to leave early from Foote.

In the Spring 2000, after trying to use warnings, counseling, specific written directives, probation and other methods to correct Whitson's behavior, Foote believed the change in Whitson's position was necessary. Foote did not want Whitson to continue direct supervision of employees when he was so resistant to Foote's supervision and direction. He did not want Whitson making final decisions on code interpretations and permit issuances. He also wanted to make sure a supervisor under his direction could be trusted and would use good judgment. He recognized that Whitson was a long-time employee, but also that Whitson had a number of problems discussed above, and that Whitson had failed to correct those problems after repeated attempts to remedy the problems short of termination by the City.

The decision was made to create a position called Chief of Code Enforcement and that Josh Harris would fill the position. Whitson would report to Josh Harris and the building inspectors who had reported to Whitson would instead report to Josh Harris. Whitson would no longer have final authority for permit issuances, code interpretations and compliance.

Foote believed that Josh Harris would be a good Chief of Code Enforcement because he had observed Harris' work since Harris had been with the City since 1995. He also knew Harris had grown up in the building industry. Whitson really does not dispute the motives for this change. Whitson claims that his work load was too heavy and it inhibited his job performance. Whitson also states that Harris was someone that Foote felt he could control and that this was the "real" reason Foote wanted Harris to supervise Whitson and the other building inspectors. Whitson also claims that restructuring may be related to him being a whistle-blower regarding a case that had nothing to do with age or disability discrimination or any Title VIII discrimination. Whitson had no factual basis to contend that Josh Harris was encouraged by Foote to do anything to Whitson. Whitson did say that he felt Josh Harris had a personal relationship with Foote and that Foote personally liked him over all the other employees in the department, including those who were young and non-disabled. Whitson believes that these reasons for restructuring the job were also reasons behind his termination.

He knows of no discriminatory animus by Foote. Whitson claims that Foote once said in a staff meeting "out with old and in with the new", but on further examination, Whitson admitted this comment was made about the failure to follow procedures that Foote was just implementing and had nothing to do with the age of the employees. Whitson has no evidence of any type of slur or derogatory remark regarding age or disability. In short, other than Whitson giving his opinion that some of his criticized code interpretations were correct, Whitson does not refute the other voluminous negative reprimands, evaluations, and other negative documentation in his employment file.

Whitson admits that he was given his job description after restructuring in June 2000. After the job restructuring was complete, Whitson immediately was absent from work

for almost all of June 2000. He claimed to be on sick leave at that time. On July 19, 2000, one month after the job was restructured, Whitson requested Family and Medical Leave and submitted a doctor's statement stating that he cannot perform the essential functions of his job. It was during this period, that Whitson applied for long-term disability benefits through the City's long-term disability carrier. Whitson represented to this carrier that he was totally disabled from work. Whitson admits that he had previously told Mitch Ferguson, the Personnel Director, in October 1999, that he was going to be unable to work any further if his hearing got much worse. Whitson claims that between 1990 and 1999, his hearing problem did not affect his job. Whitson also stated that his disability has never affected his judgement or his ability to read and understand numerous memos and directives he received. Whitson did testify that his hearing after October 1999 gradually deteriorated, which is consistent with his various applications for disability benefits.

In September 2000, Whitson returned to work with the City, not because of improved health, but because he had run out of sick leave and had not received any long-term disability at the time and needed the money. Shortly after Whitson's return to work, Harris, as his supervisor, had an immediate problem with Whitson's job performance. On September 14, 2000, Harris requested that Whitson perform a specific inspection. The inspection was placed in Whitson's basket that was identified solely with Whitson. This was the same system that Whitson had used to make assignments to building inspectors when he supervised them. Whitson received this assignment at noon. Whitson claims that he did not learn of the assignment until 3:00 p.m. although he was supposedly in the office the entire time. Whitson claimed in his deposition, that he had a lady coming into the office for an appointment and he could not do the inspection. However, he was aware that a contractor and subcontractors were waiting on him to arrive at the inspection

site at 3:00 p.m. Whitson did not attempt to contact these individuals or make alternative arrangements for the inspection. He had not performed the inspection when he was contacted by Harris the following day. Harris found the inspection in Whitson's basket and completed the inspection himself. The problem Harris had with Whitson's performance was not only this missed, urgent inspection for which an appointment had been set, leaving the customer, so to speak, i.e. contractors, waiting and wasting their time, but that Whitson did not contact the contractors, did not try to get word to them to make any alternative arrangements to handle the matter, and did not perform the inspection the first thing the following morning. What was particularly troubling about this situation, was that Harris came into work and performed the inspection the following day and that Whitson did not take any action toward the situation which he was fully aware was an urgent matter in which contractors and subcontractors were going to be mad.

On the heels of this incident, Whitson was told, by a written note, to perform a particular inspection on October 18, 2000. Whitson claimed that he did not understand the note. It is undisputed he failed to carry out the inspection in a timely manner and that Harris undertook the task himself.

On November 13, 2000, before receiving any notice of the EEOC complaint filed by Whitson, Josh Harris asked the Mayor for Whitson's termination. Whitson testified that the EEOC charge was the first notice he had given to anyone at the City that he was being discriminated against on the basis of age or disability.

On December 5, 2000, the Mayor requested Harris to provide him with a more detailed statement of the reasons Harris requested Whitson's termination. Harris complied. A hearing was conducted in February 2001 by the Mayor at which Whitson had legal counsel present. The Mayor stated

in a written opinion that the termination was appropriate for the incidents in September and October 2000 in light of Whitson's work performance in the past ten years.

Since leaving the City's employment, Whitson filed in October 2001, an application for Social Security disability benefits, claiming he was totally and permanently disabled. Whitson admits that he is totally disabled currently from performing his former job. The Social Security regulations do not allow an individual to obtain Social Security Benefits until he has been out of work as least five months. All of Whitson's applications for disability along with his own testimony about his health, indicate that Whitson was unable to physically perform the essential functions of his job from 1999 until his termination in 2001.

Whitson asked for and received the right to tape staff meetings and to have the City pay for a certain number of cassette tapes. He claims that on certain occasions he asked for help with problems regarding humidity. These requests were years prior to his termination and certain actions were taken to determine if there was poor air quality and to rectify possible problems. He was asked twice to have his hearing evaluated. On one occasion in which an evaluation was requested in 1998, Whitson had a lawyer write and say that the City was harassing him by requesting he have his hearing evaluated. Whitson claims that he asked the Personnel Director for assistance in October 1999, but it was a generalized request for help without any specific items requested. Nevertheless, the Personnel Director, Ferguson, requested Whitson have his hearing tested and Whitson did in February 2000. Ferguson received this report. The report did not specify any particular equipment that Whitson had to have in order to perform the essential functions of the job. One of the items mentioned in the report as possibly being helpful to Whitson, Whitson already had – hands-free phone

capability. The report mentioned that Whitson might hear better, but his hearing certainly would not be cured by a digital hearing aid. Whitson already had a hearing aid. This new digital hearing aid would cost the City approximately $4,200. This hearing aid would not be something strictly for a unique business purpose. Finally the document mentions that if Whitson had trouble using a phone a TTY phone might be helpful. This item would cost $775. Ferguson began the process of pricing this information. Whitson had never claimed to not understand people from phone difficulties and his problems in his job performance were unrelated to phone conversations. Shortly after Ferguson began the process of pricing the TTY phone and analyzing its need for Whitson, Whitson left to go on Family and Medical leave described above. The events of the alleged request for accommodations all would have occurred over 180 days from the filing of his EEOC charge.

REASONS FOR DENYING THE PETITION

There is no conflict between the Court of Appeals' decision in this case and any decision of this Court or prior Eleventh Circuit's decisions. This petition, if Certiorari is granted, would amount in substance to an argument by the petitioner that the trial court and the Eleventh Circuit Court of Appeals misapplied properly stated rules of law. There exists no novel issue of law involving this case. Petitioner attempts to massage the undisputed facts and omit certain facts in his Petition for Writ of Certiorari to fashion a conflict between the Eleventh Circuit and the District Court's decision in this case with this Court's prior precedent. However, a review of the material, undisputed facts demonstrate that no such conflict or novel legal issues exists.

1. Petitioner failed to establish a *prima facie* case of discrimination under ADA and ADEA and failed to establish pretext sufficient to defeat Respondent's Motion for Summary Judgement

A. Whitson failed to establish a *prima facie* case of discrimination under ADA.

The ADA mandates that employers shall not discriminate against, "a qualified individual with a disability because of the disability of such individual in regards to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment". 42 U.S.C. § 12112(a). A *prima facie* case of disability discrimination is made when, by preponderance of the evidence, the plaintiff demonstrates that he 1) has a disability; 2) is a qualified individual with a disability; and 3) was subjected to unlawful discrimination because of a disability. 42 U.S.C. § 12112(a); *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999).

ADA defines a disability as either a physical or mental impairment that substantially limits one or more of the major life activities of an individual, having record of impairment, or being regarded as having such an impairment. 42 U.S.C. § 12101(2). Whether the person has a physical or mental impairment has been defined rather broadly by this Court. Hearing loss is commonly recognized as a physical impairment. Personality traits such as poor judgment or quick-temper are not generally protected impairments under the ADA. *Greenburg v. New York State Department of Correctional Services*, 919 F. Supp. 637 (E.D.N.Y. 1996) (bad judgment not a disability); *Duda v. Board of Education of Franklin Park School District No. 84*, 133 F.3d 1054 (7th Cir. 1998) (irritability not a disability); *Watson v. City of Miami*, 177 F. 3d 932 (11th Cir. 1999) (difficulty interacting

with others and distrustful behavior not sufficient to show impairment under ADA).

Whitson must do more than merely show he has a disability in order to seek the protection of ADA. He must first establish that he is a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines a "qualified individual with a disability" as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12112(a); *see also U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1520 (2000). The essential functions of a job are those fundamental job duties of an employment position that the individual holds or desires. The term does not include marginal functions of the position. 29 C.F.R. § 1630. The essential functions of the job can include attendance, *Hilburn v. Murata*, 181 F.3d 1220 (11th Cir. 1999); *Hartog v. Wasatach Academy*, 129 F.3d 1078 (10th Cir. 1997); *Waggoner v. Olin Corporation*, 169 F.3d 481 (7th Cir. 1999); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442 (8th Cir. 1998), the ability to work with others and receive criticism, *Gonzagowski v. Widnall*, 115 F.3d 744 (10th Cir. 1997); *Gaul v. Lucent Technologies*, 134 F.3d 576 (3d Cir. 1998). The Code of Federal Regulations contains extensive guidance as to how to determine whether an individual with a disability is "qualified". In its Appendix to Title 29, Part 1630, the C.F.R. provides:

> The determination of whether an individual with a disability is 'qualified' should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. The second step is to determine whether or not the individual can

> perform the essential functions of the position held or desired, with or without reasonable accommodation . . . [W]hether an individual with a disability is qualified is to be made at the time of the employment decision.

29 C.F.R. Pt. 1630, App. The City submits that, though Whitson has a disability, at the time decision was made to terminate Whitson's employment on November 13, 2000, as well as his job restructuring in Spring of 2000, Whitson was not a "qualified individual with a disability."

As is reflected by the legitimate, non-discriminatory reasons for Whitson's termination and job restructuring recited above in the Statement of Facts, it was not Whitson's disability that rendered him unqualified to carry out his employment responsibilities, but rather it was his job performance and his refusal to follow management's directions and rules. The City submits that it based its employment decisions on these unprotected and deficient work habits of Whitson rather than on any disability he may have had. Because Whitson has not demonstrated that he was a "qualified individual with a disability" at the time the decision was made to terminate him and restructure his job, he has failed to satisfy the elements of a *prima facie* ADA discrimination case, and summary judgment in the City's favor is, therefore, appropriate on this issue. All the evaluations, reprimands, probations and other employment documentation show a consistent pattern of resistance to supervision.

However, there is undisputed evidence that Whitson, himself, believed that he was not a "qualified individual with a disability." This evidence comes, first, in the form of Whitson's filing for private long-term disability insurance in July of 2000. At that time, Whitson filed a claim seeking long-term disability insurance claiming that he was not capable of performing any work at all. The second indication

that Whitson was not a "qualified individual with a disability" was his submittal on July 19, 2000 of a FMCA claim asserting affirmatively that he could no longer perform the essential function of his job. These documents were submitted one month after the restructuring of his job and four months before his termination was proposed. The third indication that Whitson was not a "qualified individual with a disability" arises from the fact that Whitson began receiving social security disability insurance payments approximately eight months after his termination. Whitson was terminated on February of 2001 and applied for SSDI benefits in October of 2001. Title 42 U.S.C. § 423 imposes a five-month minimum waiting period before an individual may begin collecting social security disability insurance benefits. This means that, under the requirements of § 423, Whitson must have been unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" less than three months after his termination. Whitson's application for and receipt of SSDI benefits such a short period of time after his termination, combined with his application for private disability insurance benefits before his termination, indicates that Whitson believed himself to be totally disabled during the time in which he claims that he was a qualified individual with a disability. Pursuant to *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), summary judgment was proper in that he was not a qualified individual with a disability.

Furthermore, Whitson admits that in October of 1999 he told Mitch Ferguson that he would not be able to work much longer if his hearing deteriorated. He admits since that time his hearing has deteriorated. He cannot climb, cannot stoop, walks with a cane, and has bouts of dizziness and vertigo that can cause him to fall. He now has back problems. Even though he tried to avoid the answer in his deposition, he admits he is totally disabled from work. He cannot

physically perform inspections, his health caused him to miss four times the amount of work as other employees in his department.

B. Plaintiff failed to establish a *prima facie* case of discrimination under ADEA.

Two of the elements for establishing a *prima facie* case of age discrimination are that the plaintiff is substantially younger than the person who filled the position from which he was discharged (demoted) and that the plaintiff was qualified to do the job he was discharged (demoted). *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000). The City contends that Whitson cannot establish these two elements of a *prima facie* case of age discrimination. With respect to his termination, Whitson's former position as Building Official was eliminated after his termination and has not been filled by anyone. Whitson was not replaced by a substantially younger person therefore he could not demonstrate to the trial court that he satisfied the third element of a termination claim under ADEA. In regards to Whitson's failure to promote claim, the evidence before the District Court and the Eleventh Circuit Court of Appeals shows that Whitson did not seek, and was not considered for any promotions that were denied him. The job restructuring in the Spring 2000 is not a promotion issue as claimed by the Plaintiff. There was no job open that Whitson applied for or did not receive. Instead, assignments and supervisory authority were removed from Whitson and placed in a different position, solely to address the poor job performance problems of Whitson. Therefore, he was not qualified to hold the "new position" since the restructuring was done for the very reason of addressing his performance problems and to put in a supervisor who management could control.

C. Whitson failed to demonstrate that the reasons given for the restructuring of his job were a pretext for age or disability discrimination.

Plaintiff's argument is essentially that since he challenges certain opinions of his supervisors in their evaluations and reprimands of him that this challenge creates a material issue of fact for trial on the basis of pretext even though Whitson has admitted in his deposition that the reason for the job restructuring was because the person the City management wanted in the role of a supervisor was someone management could control and who would follow management's directions – the very reason put forth by the City for restructuring the job. Whitson also wishes for the Court to completely ignore his other claim that the restructuring is due to his participation in a lawsuit as a witness where the City was a defendant. The case was not a Title VII case.

There is no direct evidence of discrimination in this case. This Court established in the case of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), a structure for analyzing cases where there is no direct evidence of discrimination. In the burden shifting analyses of *McDonnell-Douglas* once the Plaintiff establishes a *prima facie* case the burden of production shifts to the employers to articulate some legitimate reason for the employer's decision. *Id.* at 802. Once the justification is proffered by the employer for its actions, then the Plaintiff by either, direct or circumstantial evidence, must demonstrate by a preponderance of the evidence that the employer had a discriminatory intent. The evidence of the proffered reason by the City that it restructured Whitson's job because of his resistance to its management's direction, policies, and orders coupled with Whitson's admission that in fact the City wanted someone to hold the duties he held who would be controlled by management and would follow what they want, close the door for Whitson to claim that he has established pretext sufficient to allow him to go forward

to a jury on his age or disability claim of discrimination for the job restructure. Respondent has outlined above in great detail the evidence of the long-standing problems that led to Whitson's job being restructured.

Whitson claims in effect that this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) is in conflict with the Eleventh Circuit's decision in this case. Whitson's reliance on *Reeves* is misplaced. Whitson's ability to submit some evidence of falsity to a few of the evaluations contained in his foot-and-a-half personnel file does not create a material issue of fact to withstand summary judgement. In *Reeves*, the Plaintiff contradicted and showed the falsity of the reason given for the employment action against him and also was able to demonstrate that it was a pretext for discriminatory animus. In *Reeves*, the Court stated "whether a *prima facie* case plus an employer's pretexual reason for firing is sufficient to overcome a Motion for Summary Judgement depends on the strength of the Plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, any other evidence that supports the employer's case." *Reeves*, 120 S. Ct. at 2109. Whitson did not offer proof of pretext, but instead admitted, that the reason for the restructuring was for management to gain better control over whoever was going to supervise employees and control the permits issued by the office. The fact that he submits some opinion evidence as to some, and definitely not any where close to all, of the negative evaluations does not create an issue of fact for summary judgement.

D. Whitson does not demonstrate a pretext for discrimination on the basis of age or disability for his termination.

Defendant will not recite the law again with regard to the *McDonnell-Douglas* burden shifting analysis. Whitson was terminated by the Mayor and that decision was affirmed

by the Council after a hearing. The reasons given were insubordination. Whitson had no evidence of any discriminatory animus on the part of the Mayor or the Council. The Mayor met with Whitson, allowed him to present evidence and be represented through the hearing. The Mayor, after listening to both sides, felt the evidence showed that Whitson was insubordinate. In Whitson's deposition, he does not contradict the claims of insubordination, but simply offers some weak excuses to why his behavior should be tolerated. Whitson not only failed to carry out an inspection when told, but failed to take any action to reschedule the inspection or to pacify the "customer" – contractors and builders, waiting on the inspection. He simply left them waiting, knowing that the "customer" was expecting him to meet with them. On the heels of this incident was another incident that is described in the statement of facts, that demonstrates insubordination. Whitson does not provide evidence of falsity of these reasons for his firing. Therefore, this case is clearly distinguishable from *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) and the District Court was justified in granting summary judgement and the Eleventh Circuit Court of Appeals appropriately affirm that judgement. Whitson failed to make even a minimum showing that the City of Gulf Shores' articulated reasons for termination were untrue. The District Court and the Eleventh Circuit Court of Appeals properly did not substitute their business judgement for that of the City. Whitson did not provide any reason or evidence to show that the reasons proffered by the City should not be believed. The proffered reasons by the City are not weak, implausible, inconsistent, incoherent or contradictory such as a reasonable factfinder could find them unworthy of credence.

2. Petitioner failed to present sufficient evidence that he was qualified under ADA and Petitioner failed to establish an actionable claim for failure to accommodate his disability

The ADA mandates that employers shall not discriminate against, "a qualified individual with a disability because of the disability of such individual in regards to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment". 42 U.S.C. § 12112(a). A *prima facie* case of disability discrimination is made when, by preponderance of the evidence, the plaintiff demonstrates that he 1) has a disability; 2) is a qualified individual with a disability; and 3) was subjected to unlawful discrimination because of a disability. 42 U.S.C. § 12112(a); *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999). As stated above in Section 1, Whitson cannot demonstrate he is a qualified individual with a disability. For purposes of brevity, the City incorporates that argument by reference from the previous section.

Assuming for purposes of argument that Whitson was a qualified individual with a disability, the City did not fail to make reasonable accommodations for him in violation of the ADA. The Court has recognized that unlawful discrimination can consist of failure by the employer to provide reasonable accommodations for the employee's disability. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001). In addressing ADA discrimination claims, the Eleventh Circuit addressed reasonable accommodations as follows:

> An accommodation can qualify as 'reasonable,' and thus be required by the ADA, only if it enables the employee to perform the essential functions of the job. *See LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998). The plaintiff bears the burden of identifying an

> accommodation, and of demonstrating that the accommodation allows him to perform the job's essential functions. *See Stewart v. Happy Harmon's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) [sic] *Willis v. Conopco, Inc.*, 108 F.3d 282, 283 (11th Cir. 1997).

Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255-1256 (11th Cir. 2001).

Whitson asked Foote to allow him to tape meetings even though the purpose of the taping was to "build a record" and did not effectively assist his disability. Foote agreed to the taping. No other accommodations were requested of Foote. When Foote got an evaluation of Whitson's hearing and tried later to have a follow-up evaluation, Whitson had a lawyer write the City objecting to the testing. Mitch Ferguson, the personnel director, was allegedly approached by Whitson in October of 1999 and asked generally for "help" because Whitson said he would not be able to work much longer with his hearing problem. Whitson also testified that his hearing never prevented him from carrying out his duties. Ferguson asked Whitson to have his hearing evaluated again in February of 2000. General requests for "help" with working conditions are not sufficient to trigger the duty to make reasonable accommodations; Whitson must be able to identify an accommodation that would enable him to perform the essential functions of his job. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d at 1255-1256. Whitson's generalized request is insufficient. He never made a specific request for assistance to anyone who had decision-making authority at the City that was not granted. The report received by Ferguson suggests some possible equipment that could help some individuals with hearing loss but never says that the equipment is needed for Whitson to perform the essential functions of his job. One piece of equipment, a hearing aid, would not be a reasonable accommodation since, it is primarily for personal

use and because of its expense and minimal benefit. Likewise, neither Whitson nor his doctors said he needed a TTY phone to perform the essential functions of his job and Whitson had available the other telephone equipment suggested by the report, such as a hands-free phone. Ferguson priced the TTY equipment in April of 2000 and continued looking at these options up to the time that Whitson left work under FMLA stating he was unable to perform the essential functions of his job because of depression and seeking long-term disability benefits.

Finally, Whitson claimed that a humidity problem existed at the office. This alleged problem was first complained about years before his EEOC Complaint. It was investigated by the City and the City could not verify that a problem existed. The City did provide de-humidifiers for a time. This Complaint is outside the 180 days of the EEOC filing and does not rise to an accommodation under ADA and is speculative at best.

The City submits that Whitson's request for help with his work conditions are not sufficient to trigger a duty to provide any reasonable accommodation to Whitson. *Lucas v. W.W. Grainger*, 257 F.3d at 1255-1256. Moreover, as we have argued above, Whitson's inability to carry out the essential functions of his job was not related to his disability, but rather to personality traits not protected by the ADA. There was, therefore, no reasonable accommodation that the City could have made that would have rendered Whitson capable of fulfilling the essential requirements of his job. Each accommodation request would be over 180 days from the EEOC Complaint being filed, and therefore would be barred.

3. Petitioner failed to present sufficient evidence of a causal link between his complaint with the EEOC and the decision to terminate him.

Whitson alleges that the City terminated him in retaliation for his filing of a Complaint with the EEOC. It is an uncontested fact that the City initiated termination proceedings for Whitson on November 13, 2000. Likewise, it is an uncontested fact that the City did not receive notice of Whitson's EEOC Complaint until November 20, 2000. Whitson told no one with the City prior to filing a complaint with the EEOC that he was discriminated against on the basis of disability or age. It is, therefore, uncontested that the City was not aware of the existence of Whitson's EEOC claim at the time that it began termination proceedings. The elements of a *prima facie* case of retaliatory discharge are set out below. *Gross v. Culbro Corporation*, 1987 WL 46324,* 8 (N.D. Fla. 1987); *Damron v. Yellow Freight System, Inc.*, 18 F. Supp. 812, 831 (E.D. Tenn. 1998). These elements are as follows:

1. That the employee engaged in a protective activity;

2. That the employee suffered an adverse employment action; and

3. That the employee's participation in the protected activity was causally connected to the adverse employment action.

See Id.

For the purposes of this proceeding, the City will concede that Whitson is able to meet the first two elements of the retaliatory termination claim. However, the City submits that the uncontested facts of this case dictate that Whitson has not, and indeed cannot, demonstrated that his claim meets

the third element of a *prima facie* case of retaliatory termination under the ADEA or ADA. It is an uncontested fact that the City did not know that Whitson had filed an EEOC Complaint. It therefore follows that the decision to seek the termination of Whitson, which was made before the City had any way of knowing about the EEOC Complaint, cannot be causally connected to the filing of the EEOC Complaint. A causal connection between an employer's decision to terminate an employee and the employee's filing of an EEOC Complaint simply cannot exist, independent of knowledge on the employer's part that the employee has actually filed a complaint. Indeed, in its discussion of *prima facie* retaliation under the ADEA, the District Court for the Eastern District of Tennessee has gone so far as to include, as an element of a *prima facie* case, that the employer must know that the employee has engaged in a protected activity. *Damron v. Yellow Freight System, Inc.*, 18 F. Supp.2d 812, 835 (E.D. Tenn. 1998).

In addition to the lack of knowledge, the City contends that no causal connection exists because it had legitimate non-retaliatory reasons to terminate. These reasons are set out in more detail in the Section One of the Reasons for Denying the Petition.

CONCLUSION

Based on the foregoing, Respondent the City of Gulf Shores respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari of Plaintiff.

Respectfully submitted,

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